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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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Petitioner, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on December 11, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported and is unofficially reported in 76 LRRM 2111. It is reprinted in Appendix A, pp. 2a-7a.[1] The opinion of the District Court of June 17, 1970, and its order of June 24, 1970, are not yet officially reported but are reprinted at 74 LRRM 2518. They are printed in Appendix A at pp. 7a-22a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 11, 1970. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 203(d) of the Labor Management Relations Act of 1947 requires, and Section 10(a) of the Act permits, a collective bargaining agreement to be construed or enforced to empower the alleged offender to file a "grievance" based upon its own allegedly illegal conduct, thereby compelling the party aggrieved to submit to duplicative contract arbitration as the price of filing charges with the NLRB?

STATUTE INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 10(a), 203(d), and 301(a) of the National Labor Relations Act, as amended, 49 Stat. 449, and the Labor-Manage-

[1] An Appendix to this Petition, containing the opinions below, and rulings of the National Labor Relations Board and its officials in related proceedings has been separately printed. It is referred to herein as "App. A". References to the Record Appendix printed for use in the court below are designated "R". Relevant statutory provisions are printed in Appendix B, *infra*.

ment Relations Act, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.* These provisions are reprinted in Appendix B, *infra.*

STATEMENT OF THE CASE

A. The Suspension of Tobin; the Union's Charge; the Company's "Grievance" and Demand for Arbitration

Respondent United Aircraft Corporation (hereinafter the Company) is an employer engaged in interstate commerce. Petitioner, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter the Union), is the collective bargaining representative of the Company's employees at its Middletown, Connecticut, plant.

On December 30, 1969, Theodore Tobin, an employee of the Middletown plant, who is also a union steward, was given a one-day disciplinary suspension by the Company, allegedly for violating, on December 15, Company rules and a contract clause prohibiting the solicitation and collection of union dues-deduction cards on working time (R. 5). Neither Tobin nor the Union filed a grievance within five working days, nor, indeed, at any later time, challenging the suspension as a breach of the agreement (R. 126). They elected instead to challenge the suspension solely as a statutory violation, and to seek relief exclusively through the NLRB. (R. 126). This was done by the Union's charge filed with the NLRB on January 8, 1970, alleging that the Company's suspension of Tobin was discrimination violative of section 8(a)(1) and 8(a)(3) of the Act and that the asserted reason for the suspension—the alleged conduct of Union business on Company time—was a pretext (R. 30-31).

The Company received a copy of the charge on January 12, 1970 (R. 25). The following day, the Company wrote a letter to the Union as follows (id.):

> "We hereby notify you that the company is filing a grievance concerning the suspension of [Tobin] for violations of company rules on December 30, 1969 . . .
>
> "It is the company's position that the suspension of Mr. Tobin was for just cause. We were first advised that the union contended that Mr. Tobin's suspension was not for just cause when we received a copy of the charge on January 12, 1970, which the union filed with the National Labor Relations Board."

The Union responded to this letter, on the same day, as follows (R. 26):

> "The Union contends that the Tobin suspension was *illegal,* as a violation of the National Labor Relations Act, not merely that it was for a lack of 'just cause'.
>
> "We decline to consider this matter in the third step." (Emphasis in original).[2]

The Company persisted in its demand for processing of its "grievance" (R. 27-28), and the Union refused (R. 29).

On January 29, 1970, the Company demanded arbitration of its "grievance." (R. 32). In a letter dated February 18, 1970, the Union refused to arbitrate, explaining (R. 33-34):

> "Reference is made to your letter of January 29, 1970. As you are aware, the General Counsel of the National Labor Relations Board, after investiga-

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[2] The agreement provides that "grievances filed by the Company or the Union, may initially be presented at [the third] step." (R. 13).

tion, has issued a complaint against the Company alleging that its suspension of Mr. Tobin was an unfair labor practice. The National Labor Relations Board has authoritatively rejected your theory that the Company is entitled to treat as a 'grievance,' within the meaning of Article VII, Section 1, and Step 3(b), and Step 4, and Article VII, Section 3(a)(1) of the collective bargaining agreement, a claim by the Union that discharge or suspension of a steward for union activity is an unfair labor practice. Such a claim poses a question of construction and application of the governing federal statute, rather than a question of 'interpretation, application or compliance with the provisions of this agreement,' to which, as Section 1 demonstrates, the grievance and arbitration provisions of the agreement are confined.

"Since, in our view, the Company is not entitled or empowered to subject the question of the legality of Tobin's suspension to the grievance and arbitration procedure, we reject your proposal that an arbitrator be designated to consider the matter."

B. The Relevant Provisions of the Agreement

The collective bargaining agreement establishes a grievance procedure for the resolution of "difference[s] aris[ing] between the Company, the Union or any employee concerning the interpretation, application or compliance with the provisions of this agreement" (R. 11). The agreement provides that employees will not be discharged or suspended except for "just cause" (R. 24),[3] and that:

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[3] Another provision of the agreement states:

"The Company and the Union recognize that employees covered by this agreement may not be discriminated against because of race, color, sex, age or religious belief, nor because they engage in activities which are protected by the National Labor Relations Act as amended." (R. 9).

> "Any employee shall have the right to appeal his discharge or suspension through the grievance procedure within five (5) working days from the date thereof. Failure to file such an appeal shall prohibit any further consideration of such discharge or suspension." (R. 24).

The Company's "grievance" was first tendered after the time had expired in which Tobin or the Union could have challenged the suspension under the agreement.

C. The Proceedings Below

1. The Company Institutes This Action

On March 20, 1970, more than a month after the Union's refusal to arbitrate, but less than two weeks before the Union's 8(a)(3) charge was to be heard by a Board Trial Examiner (R. 143), the Company instituted the present action under Section 301 of the Act, by filing a "Petition to Compel Arbitration" (R. 4-6). The Petition sought an order compelling the Union to arbitrate "a dispute concerning the disciplinary suspension of one Theodore B. Tobin" (R. 4). The Company explained its purpose in seeking arbitration of the propriety of its own suspension of Tobin: The NLRB has a practice, in some cases, of deferring to arbitrators' awards; the Company wished to have an arbitrator determine whether its suspension of Tobin was for "just cause," so that it could request the NLRB to "defer" to the arbitrator's award rather than adjudicate the Union's 8(a)(3) charge on the merits (Petitioner's Memorandum in Support of Petition to Compel Arbitration, pp. 10-14).

2. The Company Utilizes This Action To Delay the NLRB Proceeding Against It

Consistent with its avowed purpose, the Company has persistently sought to utilize the pendency of its action, and the orders of the courts below, to delay the NLRB's unfair labor practice proceedings against it. When the Union's discrimination charge came on for hearing before a Board Trial Examiner, on April 1, 1970, the Company moved that further proceedings be stayed pending disposition of this suit.[4]

The hearing lasted one day, and upon its completion the Trial Examiner took the entire case under advisement, including the Company's motion. On May 15, 1970, the Trial Examiner entered an order staying further proceedings as requested by the Company (R. 113-115). Both the Union and the Board's General Counsel requested permission to file special appeals to this ruling (R. 118-123, 125). On June 3, 1970, the Board granted the special appeals, reversed the Trial Examiner's order, and "directed" him "to proceed forth-

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[4] The Company explained that its purpose in filing the suit was to circumvent the Board's rejection in earlier cases between these parties of its contention that the Union was required to submit to duplicative arbitration:

> "TRIAL EXAMINER: What happened to these cases? Did they go to Court?
>
> "MR. WELLS: They are all pending in the Second Circuit. As Counsel noted in those cases, the Company tried through the National Labor Relations Board to implement a decision on these as a resolution of these disputes by bargaining and by arbitration, and as those decisions indicate, the Board's not impressed. Now, in this particular case we decided the Board isn't going to help us any, we'll go to the Court and see if we can get our contract enforced by the Court" (R. 96-97).

with with his decision on the merits of the proceeding" (R. 125).

When the District Court decision ordering arbitration was issued (see pp. 9-10 *infra*), the Board Trial Examiner had not yet issued his decision on the charges against the Company. Two days later, on June 19, 1970, the Company filed another motion with the Trial Examiner "to defer action on the complaint pending arbitration." The Company argued that the Board, if it proceeded to decide the 8(a)(3) case, "would . . . frustrate and interfere with the arbitrator who must decide the same contested issues". On June 24, the Trial Examiner denied the motion, but stated that he would "suspend any further action on the merits until the [Company] has exhausted its right to appeal to the Board from this ruling . . ." (R. 143). The Union requested permission to file a special appeal from this "suspension" of further action (R. 144-145); the Company requested permission to file a special appeal from the denial of its motion. On July 1, the Board granted the Union's appeal and "directed" the Trial Examiner "to decide and issue his decision without further delay" (R. 146). On the following day, by telegraphic order, the Board denied the Company's request to appeal.

Thereafter the Trial Examiner issued his decision on the merits, finding that the Company had violated Sections 8(a)(1) and 8(a)(3) in suspending Tobin. The Trial Examiner stated that there was "no need to resolve" the issue whether Tobin had violated the Company's rules for, assuming *arguendo* that he had, that was not "in fact the motivating reason for the suspension of Tobin." (R. 153, 154). The Trial Ex-

aminer based his conclusion that the Company was actually discriminatorily motivated in part upon "the pattern of discrimination against Union stewards established by the Board's findings in certain earlier cases." (R. 157). The Trial Examiner directed the Company to provide Tobin back pay for the period of suspension and further ordered the Company to cease and desist from discriminating against employees because of their Union activities (R. 158-159).

While the case was pending before the Board on exceptions to the Trial Examiner's decision, the court below affirmed the District Court. Thereupon, the Company tried again. On December 31, 1970, it filed a motion with the Board requesting it to defer its decision until the Union had complied with the court decision by proceeding to arbitration on the grievance filed by the company. By Decision and Order issued February 22, 1971, that motion was denied by the Board as "without merit." (Appendix C, p. C 2, n. 1, *infra*). In that Decision the Board adopted the remedial order against the Company which the Trial Examiner had recommended, and approved his finding of the Company's illegal motivation. But the Board added that the company's action was illegal also under the principle of *Labor Board* v. *Burnup & Sims,* 379 U.S. 21, because "Tobin was following the terms of the contract" and was engaged in protected activity. *Id.,* pp. C2-C3, *infra.*

3. The District Court Orders Arbitration

On June 17, 1970, the District Court (Clarie, J.), decided that plaintiff was entitled to an order directing arbitration. The court deemed controlling decisions which emphasize enforcement of arbitration agreements

and broad reading of arbitration clauses, even when the sole consequence is a duplicative proceeding, provided the power of the NLRB to exercise its independent jurisdiction is unimpaired. The District Court rejected the Union's contention that the contract should not be construed as empowering the Company to file a "grievance" over its *own* alleged statutory violation *i.e.,* the allegedly illegally motivated suspension, on the theory that arbitration would determine the wholly different question "whether or not the *employee's* conduct was justified under the terms of the contract." (App. A, p. 19a). (Emphasis added.) And it held that a construction of the contract which would leave the Union an option to proceed solely upon the statute, or upon the contract, or both, was inadmissible because that "would totally destroy * * * mutuality" (App. A, p. 15a). This, in the Court's view, would conflict with the philosophy of enforcing concomitant undertakings, expressed in *Boys Markets* v. *Retail Clerks,* 398 U.S. 235, 252.

4. The Court of Appeals Affirms the District Court's Order.

The Court of Appeals affirmed the District Court's order directing arbitration.

It first held that the contract required arbitration:

> "The district court found that the Company had presented a grievance cognizable under those provisions, and we agree. The Union argues that the dispute is over Tobin's disciplinary suspension, not over Tobin's alleged breach of the Company's rule and his alleged breach of the no solicitation clause in the contract. Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute could the Court arrive at such a conclusion. Our duty is to

order arbitration where under any reasonable construction the contract would cover the grievance, not to strain for unreasonable constructions. *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253, 256 (2 Cir. 1968)." (App. 5a)

The Court then held, albeit without reference to § 10(a) of the Act, that public policy does not militate against enforcement of the contract as so construed. (App. A, pp. 5a-6a):

> "Next the Union contends that if the agreement, properly interpreted, makes subject to arbitration alleged Company conduct which would be an unfair labor practice, such an agreement is unenforceable as against public policy, because it permits the arbitrator to invade the province of the Board. That contention has long since been foreclosed. [citing cases.]
>
> * * * * * * * * *
>
> The possibility of * * * deferral [to arbitration] by the Board is the basis for the Union's final contention, that the existence of concurrent jurisdiction coupled with the possibility of deferral by the Board, may in some cases deprive the Union of any advantage which might be gained by its choice of a forum. It is clear that an employer may not resist contract arbitration on the ground that it prefers the Board as a forum *Carey* v. *Westinghouse Electric Corp., supra* at 268; *Smith* v. *Evening News Ass'n, supra.* We perceive no compelling reason why a Union which has executed an arbitration agreement should be in a more favorable forum shopping position. The Union argues that the district court has exacted a price for its resort to the processes of the National Labor Relations Act before the Board, in that it is being forced simultaneously to arbitrate. This argument

is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, UNDERMINES THE NATIONAL LABOR POLICY, AND MULTIPLIES LITIGATION.

INTRODUCTION

This is one of the class of cases which, in *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197, the Court said it would "face * * * when they arise," namely, "situations in which serious problems * * * arise from both the Board and the courts having jurisdiction over acts which amount to an unfair labor practice." *Smith* and its progeny held that the statute creates concurrent remedies before the Board on the one hand, and courts or arbitrators on the other, when it is asserted that the same conduct allegedly violates both the statute and the collective bargaining agreement. In that event, this Court held, the alternative rights and remedies are complementary, and the plaintiff has the right to choose the forum or forums in which he wishes to assert his interests. The decision below gives rise to "serious problems" because the Court of Appeals, despite this Court's cautionary reservation in *Smith,* extended concurrent jurisdiction to situations, such as the present, where the accused party asserts the right to arbitrate for the sole purpose of defeating the other party's right to seek relief for an unfair labor practice *from the Board alone.* The Court thus followed the formula of *Smith*—"concurrent jurisdiction"—to defeat its substance—which is to give the choice to the putative victim. That choice, granted by Congress, is characterized below as "forum shopping" and the party

charged with having committed an unfair labor practice is actually held to be entitled to an *equally* "favorable forum shopping position" as its putative victim (App. 6a). One result, as we shall show, is to channel into arbitration matters which are not within the objectives of § 203(d), as defined by this Court. A second consequence, also discussed below, is to burden recourse to the unfair labor practice remedy which § 10(a) provides and guards against private agreements to arbitrate, contrary to this Court's decisions. Perhaps the most serious adverse consequence of the decision below is also the most obvious: it promotes multiplicity of litigation—"the least desirable of all solutions * * * a necessity for suit in both forums" *U. S. Bulk Carriers* v. *Arguelles,* 39 U.S.L.W. 4101, 4106 (Harlan, J. concurring).

I. SECTION 203(d) DOES NOT REQUIRE ARBITRATION OF THE COMPANY'S "GRIEVANCE."

In directing arbitration, the courts below took liberties with both the "grievance" and the agreement. For, as construed below, the issue to be arbitrated 1) is not the grievance framed by the Company[5]; and 2) is

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[5] Nothing could be clearer than that the Company's "grievance," its demand for arbitation, and its Petition in the District Court, all sought a determination of the propriety of its own conduct, not Tobin's. The affidavit of the Company's Industrial Relations Administrator filed in support of the Petition stated:

> "4. The suspension of Theodore Tobin . . . and the dispute between the Company and the Union which resulted therefrom was referred to the grievance procedure by the Company on January 13, 1970 . . ." (R. 7)

Tobin's alleged misconduct occurred on December 15, 1969, two weeks prior to his suspension (R. 126). But the "dispute" which the Company sought to arbitrate was one which "resulted . . . from" the suspension. Manifestly, that "dispute" related to the propriety of the Company's conduct, not Tobin's.

excluded from arbitration by the terms of the agreement itself.[6] Cf. *Atkinson* v. *Sinclair Rfg. Co.*, 370 U.S. 238, 241. Of course, such error, while unfortunate for the losing party[7] is not, as such, justification for review by this Court. But review *is* warranted, where, as here, the lower courts' construction is due to a grave misconception of the underlying standard. Both courts below considered themselves bound by decisions originating in the *Steelworkers* trilogy, which state a broad

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[6] Many collective bargaining agreements make the scope of arbitration coterminous with the scope of the grievance procedure. This one, however, does not. Article VII, Section 3 (a) lists thirty-nine issues which "shall be submitted to arbitration upon the request of either party" (R. 15-19). Article VII, Sections 3(b) and (c) state that all other grievances are arbitrable only by mutual consent (R. 19).

One of the thirty-nine issues made arbitrable at the behest of either party is "A grievance concerning the discharge or disciplinary suspension of an employee" (R. 15), and it was under this provision that the Company sought to arbitrate the propriety of its disciplining of Tobin. However, the issue which the courts below ordered to arbitration—Tobin's alleged violation of Article IV and of Appendix A, Section 1 of the Agreement—is not made arbitrable by the agreement.

[7] The result below is particularly harmful to petitioner because its sanctions the Company's plan to compel arbitration whenever the Union accuses it of unfair labor practices. The Company tried repeatedly before this case arose to compel arbitration in such situations by (a) filing refusal to bargain charges against the Union (App. A pp. 23a-27a), and (b) raising the Union's refusal to arbitrate as a defense to unfair labor practice charges against the Company (App. A pp. 28a-33a). Indeed, after the decision below, the Company obtained an order from the District Court (from which the Union has appealed) compelling a sister Local to arbitrate the allegedly discriminatory discipline of another steward, named Sullivan. *United Aircraft Corporation* v. *Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL-CIO*, No. 14,206. On February 16, 1971, the Second Circuit granted a motion for stay pending appeal in that case, No. 71-1117.

policy in favor of arbitration. But that policy does not govern—indeed it is defeated—where arbitration has no purpose except to influence the decision of the tribunal charged with determining statutory violations. This distinction is drawn in the very opinion which first declared the rule of construction upon which the courts below relied:

> Thus the run of arbitration cases, illustrated by Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *Steelworkers* v. *Warrior & Gulf N. Co.,* 363 U.S. 574, 577-578 (footnotes omitted).

The arbitration which was directed in this case however is not a "substitute for industrial strife";[8] rather the avowed purpose of moving party is to utilize arbitration as a "substitute for litigation," *before the Board.* Under these circumstances, *Wilko* v. *Swan,* not *Warrior & Gulf,* is controlling.

Cases such as *United Steelworkers* v. *American International Aluminum Corp.,* 334 F.2d 147, 152 (5 Cir.),

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[8] There is no suggestion of a threatened strike by the union over the suspension of Tobin, or of a lockout by the Company due to Tobin's alleged infraction of the Company's rules or the agreement. (See App. A, p. 27a).

cited by the District Court, (App. A, p. 17a), are entirely consistent with this analysis. They hold that arbitration will be directed where the movant asserts that the same action of its adversary is both an unfair labor practice and a breach of contract. This result is reached not out of uncritical obeisance to the benefits of arbitration, but in order to assure that the aggrieved party can obtain, as was said in *American International,* "all merited relief." 334 F.2d at 152.[9] This purpose is frustrated, not promoted, by directing arbitration at the insistence of the party charged with the statutory violation. No principle of mutuality requires courts to treat the wrongdoer and his victim with fine impartiality.[10]

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[9] This effectuates the Congressional intent in eliminating the word "exclusive" from Section 10(a)—to provide an additional "option," (*Amazon Cotton Mills Co.* v. *Textile Workers Union,* 167 F. 2d 183, 187 (4 Cir.)), to "the aggrieved party." *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303, 313, n. 9 (5 Cir.). The only limitation is that dual proceedings may not culminate in "duplicate compensation." *Automobile Workers* v. *Russell,* 356 U.S. 634, 646.

[10] The District Court was of the view that "mutuality" was required by this Court's decision in *Boys Markets* v. *Clerks' Union,* 398 U.S. 235, 252 the following portion of which the court below quoted immediately after its "mutuality" discussion (App. A p. 15a):

> "Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concommitant under taking of the union to refrain from striking."

The District Court plainly misread *Boys Markets.* This Court was there concerned that an employer who agrees to arbitrate union claims that the *employer* has violated the agreement has a "similarly efficacious remedy" when it contends that the *union* has breached the agreement (i.e., a right to enjoin strikes in breach of contract). The Court was not saying that in exchange for an employer's agreement to arbitrate contractual disputes the union must submit to arbitration of alleged employer *statutory* violations.

In short, the principles underlying the decisions relied on below are entirely beside the point where arbitration is sought, not to resolve a general dispute "arising over the application or interpretation of an existing collective-bargaining agreement" [Sec. 203(d)], but as a ploy in litigation before the NLRB. The rule of construction which the court should have applied is that the parties will not be presumed to have committed to arbitration disputes which the aggrieved predicates solely on the statute, absent a clear, explicit, statement in the collective bargaining contract directing an arbitrator to hear and determine *such disputes. Vulcan Materials Co.* v. *United Steelworkers,* 434 F.2d, 446, 458, (5th Cir.) pet. for cert. pending, No. 1121 this Term. See also *Twin Excavating Co.* v. *Local Union No. 731,* 337 F.2d 437 (7th Cir.); *United States Steel Corp.* v. *Seafarers Int'l. Union,* 237 F. Supp. 529, 532 (E.D. Pa.): *Silvercup Bakers Inc.* v. *Fink Baking Corp.,* 273 F. Supp. 159 (S.D.N.Y.).

II. SECTION 10(a) FORBIDS COMPELLING THE UNION TO ARBITRATE THE COMPANY'S "GRIEVANCE."

Contrary to the assumption of the courts below, the declaration in Section 10(a), that the Board's "power shall not be affected by any other means of adjustment or prevention that has been or may be established *by agreement,* law or otherwise," is not exhausted merely by respecting the independence of the Board's jurisdiction. The guarantee renders unenforceable any law or private agreement which imposes a "financial burden," or in any way conditions or qualifies the right of an aggrieved party to "unimpeded access" to the Board. *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 238-239; *NLRB* v. *Marine Workers,* 391 U.S. 418, 424. An agreement which allows the accused violator

to impose upon the party aggrieved the "expense of arbitration" (*NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 438), as the price of access to the Board, is incompatible with this guarantee. Moreover, in the words of Judge Marvin Frankel, "[i]t would be at least a burdensome incongruity to hold that a plaintiff seeking redress for [statutory] wrongs must litigate the same charges twice, once before an arbitrator and again [before the Board]." *Silvercup Bakers, Inc.* v. *Fink Baking Corp.*, 273 F. Supp. 159, 163 (S.D.N.Y.).

The policy of Section 10(a) militates against construction of a contract which would empower the alleged violator to compel the party aggrieved to submit to duplicative contract arbitration, and forbids enforcement of any contract clause which unequivocally vests such power in the alleged wrongdoer. For the effect is to transform the aggrieved party's option into an obligation, and that is to deprive the aggrieved party of the "substantial right" (*Wilko* v. *Swan*, 346 U.S. 427, 437-438; *U.S. Bulk Carriers* v. *Arguelles*, 39 U.S. L. Wk. 4101, 4104 (Harlan J. concurring)), "to decide what law he will rely upon" (*The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25) and to "select the forum." *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266.

In the only other case we have found where the alleged offender (there a union) attempted to compel duplicative arbitration in such circumstances, arbitration was stayed on motion of the employer "pending the conclusion of the proceedings before the National Labor Relations Board." *Kentile, Inc.* v. *Local 457, Rubber Workers*, 228 F. Supp. 541 (E.D.N.Y. 1964) See also, Dunau, *Three Problems In Labor Arbitration*, 55 VA L. Rev. 427, 441 (1969).

In sum, Section 301 confers "a right * * * and not a duty" to place the claim "before a grievance committee or before an arbiter." *U. S. Bulk Carriers* v. *Arguelles, supra,* 39 U.S. L.W., at 4102. It provides "only an optional remedy to" victims of statutory violations (*id.,* at 4103). Section 10(a), in turn, forbids transformation of that "right" or "option" into a "duty" by *"agreement."*

All of the prior cases in this Court, and all the cases relied on below, rejected objections to arbitration by a party whose conduct was, or could have been, challenged as an unfair labor practice or otherwise subjected to the Board's authority. To hold that overruling the objections of *such* a party requires overruling objections to duplicative arbitration by the party claiming to have been victimized by the other's statutory violation is not to "equalize" obligations or establish "mutuality," but, instead, to "turn the blade inward." *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 237.

We submit that a petition to compel arbitration by the alleged violator should be dismissed whenever it appears that the aggrieved party's claim is based upon the statute, rather than the contract, for in such cases the wrongdoer's only possible objective is to influence the Board to exercise its discretion not to proceed. Use of the judicial process for such a purpose—to influence the decision of an administrative agency in a matter committed to its discretion—was expressly condemned by this Court in *Public Service Commission of Utah* v. *Wycoff Co.,* 344 U.S. 237, 246.

> "[T]he declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative

> body or special tribunal . . . *It would not be tolerable, for example, that declaratory judgments establish that an entrepreneur is not in interstate commerce in order to forestall proceedings by the NLRB* . . . or many agencies that are authorized to try and decide such an issue in the first instance. . . . Responsibility for effective functioning of the administrative process cannot be thus transferred from bodies in which Congress has placed it to the courts." (Emphasis added)

In light of the "superior authority of the Board" under § 10(a), *Carey* v. *Westinghouse Corp.* 375 U.S. 261, 272, a declaratory judgment proceeding before an arbitrator is equally intolerable.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted and the judgment below reversed with instructions to dismiss the petition to compel arbitration.

Respectfully submitted,

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APPENDIX

APPENDIX B

Statutes Involved

The relevant provisions of the Labor Management Relations Act, 1947, are:

Section 301(a): 61 Stat. 156, 29 U.S.C. § 185(a)

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 203(d): 61 Stat. 153, 29 U.S.C. § 173(d)

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

The relevant provisions of the National Labor Relations Act, as amended, are:

Section 10(a): 49 Stat. 453, 29 U.S.C. § 160(a)

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *"

Section 7: 49 Stat. 452, 29 U.S.C. § 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a): 49 Stat. 252, 29 U.S.C. § 158(a)

"It shall be an unfair labor practice for an employer—

(1) "[T]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * * * *

(3) "[B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

APPENDIX C

188 NLRB No. 96

D—4665
Middletown, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1-CA-6967

UNITED AIRCRAFT CORPORATION (PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Decision and Order

On July 13, 1970, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs, and the Charging Party filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, including Respondent's motion to include the decision of the United States Court of Appeals for the Second Circuit

and opposition of Charging Party to Respondent's motion to defer decision,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.

We find that Tobin, a union steward, was engaged in protected concerted activity at the time of the incident which gave rise to this proceeding. At that time, Tobin was assisting the Union and acting in his capacity as the Union's representative in informing employee Tibbits that, in accordance with the provisions of the contract, this could not be done on company time and dropped the cards on a table. Whether or not Respondent believed that, except for the intervention of a supervisor, Tobin would have reclaimed the cards is mere conjecture. Likewise one can only speculate as to whether or not Tobin ever entertained such a thought. In view of his throwing the cards on the table, we find that Tobin was following the terms of the contract, this is clearly protected concerted activity, and Respondent's suspicion or good-faith belief as to what Tobin may have done is not relevant. Accordingly, we find contrary to the Trial Examiner that the rule of law laid down in *Burnup and Sims, Inc.*, 379 U.S. 21, is applicable herein.

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[1] On December 31, 1970, Respondent filed with the Board a motion in which it again requested deferment of a decision of the merits of the instant case until such time as the Charging Party complies with the decision of the United States Court of Appeals for the Second Circuit issued December 11, 1970. In its decision the court affirmed an order of the United States District Court for the District of Connecticut directing the Charging Party to proceed to arbitration pursuant to the terms of a collective-bargaining agreement. We deem the motion to be without merit and hereby deny it.

Although Member Brown would normally defer to grievance-arbitration procedures in the type of situation involved here, he concurs in the present case in view of the posture of related Board decisions in 179 NLRB No. 160 and 180 NLRB No. 49.

While so finding, we do agree with the Trial Examiner's finding that the weight of the evidence herein establishes discriminatory motivation on the Respondent's part in its suspension of Union Steward Tobin. In addition to the disparity of treatment as illustrated by the written and oral reprimands given to the other empolyees involved in the incident, the record shows that a pattern of discrimination against union stewards has been perpetrated by the Respondent in prior cases.[2] Moreover, the Respondent's admission that it meted out harsher treatment against Tobin because of his union status convinces us that the Respondent's suspension of Tobin was unlawfully motivated and for this reason also constitutes a violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, United Aircraft Corporation (Pratt & Whitney Division), Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Feb. 22, 1971.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[2] *United Aircraft Corporation (Pratt & Whitney Division)*, 180 NLRB No. 49, and case cited therein in fn. 1.

[Attached to this decision is the Trial Examiner's Decision printed in App. A, pp. 40a-52a.]